Supreme Court, U.S.
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No. 01-185

In The

Supreme Court of the United States

PROFESSOR JOHN C. BONNELL,
and NANCY L. BONNELL,

Petitioners,

v.

ALBERT LORENZO, WILLIAM
MACQUEEN, and GUS J. DEMAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this case presents a significant issue involving the First Amendment protection of public employee speech on matters of public concern when the Court of Appeals concluded that Petitioner's public dissemination of a confidential student civil rights complaint and retaliatory response thereto (*"An Apology: Yes Virginia, There is a Sanity Clause"*) constituted protected speech "addressing a matter of public concern?"

II. Whether the Court of Appeals, having given petitioner the benefit of treating parts of his retaliatory conduct as "protected speech," correctly applied the standards required by *Pickering* and *Connick* in balancing Petitioner's interest in speaking the way he did against the College's interest not only in the overall "efficiency" of its publicly funded educational mission, but also the College's compliance with important statutory and contractual requirements, including (a) protecting sexual harassment complainants from retaliatory conduct, and (b) preserving the confidentiality of student records?

III. Whether there is a decision from another circuit that deviates in any significant respect from the Court of Appeals' application of *Pickering* and *Connick*?

PARTIES TO THE PROCEEDING

The Petition does not state that Mark Cousens, attorney for Petitioner's union, was dismissed from this case by the district court. Petitioner[1] accurately lists the parties to the proceeding in all other respects.

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[1] Petitioner John Bonnell and his wife brought this lawsuit jointly. For ease of reference, Respondents will refer to John Bonnell as Petitioner, in the singular.

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Appendix A

Sexual Harassment Complaint filed against Petitioner on November 6, 1998, by a student enrolled in one of his classes [R. 17, Defendants' Response Brief, Exhibit 8, Reproduced in the Court of Appeals at APX 230.] A-1

Appendix B

An Apology: Yes Virginia, There is a Sanity Clause [R. 17, Defendants' Response Brief, Exhibit 12, Reproduced in the Court of Appeals at APX 232.] B-1

Appendix C

July 9, 1999, disciplinary memorandum issued by the College Provost [R. 69, Defendants' Supplemental Brief, Exhibit 2, Reproduced in the Court of Appeals at APX 419.] C-1

STATEMENT OF THE CASE

There is no material dispute concerning the underlying factual occurrences, which the Court of Appeals set forth in detail. Most of the speech at issue is in writing, as are the directives that Petitioner violated. During an internal meeting with college administrators, Petitioner and his counsel did not dispute the facts concerning his dissemination of the student complaint to students, faculty and the news media after having been warned in writing not to do so. Petitioner also admitted his distribution of a retaliatory attack on the student civil rights complainant and his use of vulgar language in the classroom. Petitioner failed to establish that the words he used in class were germane to course content.

The Student Sexual Harassment Complaint.

On November 9, 1998, a student filed a formal complaint with the College, charging that her English Composition teacher, Petitioner John Bonnell, sexually harassed her by graphically describing his personal sexual experiences and fantasies in class. The student complained that Petitioner used "lude [sic] and obscene . . . " language while making "dehumanizing, degrading, and sexually explicit . . . " comments in class.[2] The student

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[2] In 1992, the College introduced a policy stating that: "Regular use of profane, vulgar, or obscene speech in the classroom which is not germane to course content (and thus educational purpose) as measured by professional standards will lead to the imposition of discipline." Based on past complaints, Petitioner had been warned in 1998 to stop using words such as " 'fuck, 'cunt,' and 'pussy' " unless they are

also reported that Petitioner made sex the "major content" of his class and "took advantage of his position to express his own previous sexual experiences" and "sexual escapades." The student indicated that she hesitated before filing her sexual harassment complaint because Petitioner used his position "as a platform for authority to intimidate his students not to complain about him" and "repeatedly made fun of students who had expressed offense or disgust and he also laughed at them."[3] [Appendix A.]

Investigatory Meetings.

In November of 1998, Dr. Gus Demas, Dean of Liberal Arts, informed Petitioner of the complaint and that a meeting was scheduled to discuss it. Petitioner responded by distributing the complaint, with the student's name redacted, to his students and posting it in the English Department.

During the disciplinary meeting in early December, 1998, at which Petitioner was accompanied by union officials and his union's attorney, Petitioner admitted that he

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"germane to a discussion of appropriate course materials. . . . " Petitioner responded to these warnings by asserting that vulgar language "reflects who I am and it gets the students' attention."

[3] The College has never admitted that the complaint was "unfounded." The College simply determined that the conduct the student complained about did not state a sustainable sexual harassment claim because it had the tendency to offend men and women equally. Petitioner has never disputed the factual basis of the student's complaint or the fact that the student honestly believed she had been sexually harassed by Petitioner.

used phrases such as "blow job," "tits," "balls" and "butt-fucking" in class. Petitioner was given the chance to explain how this language was germane to class. He did not. The College scheduled a formal hearing later that month, during which Petitioner was given another opportunity to explain how the language he used was germane. Again, Petitioner failed to explain how the vulgar language he admittedly used was germane to class. [*See, e.g.*, R. 17, Defendants' Response Brief, Exhibit 10, Affidavit of William MacQueen, ¶¶ 2-4 ("Plaintiff did not explain how his use of vulgar language was related to the class material" during either the internal investigatory meeting or the hearing in December of 1998); *An Apology*, p. 3 (Petitioner admitted that, during an internal investigatory meeting and a hearing in December of 1998, he "possibly failed to make the fullest explanation" of how his vulgar language was germane); R. 28, Plaintiff's Reply Brief, Exhibit A, Transcript of Faculty Senate Meeting, p. 7 (Petitioner admitted to his union that, when questioned in December of 1998, he "did not remember context" and otherwise failed to explain how his vulgar language was germane to course content).]

Post-Investigation Discipline.

In January of 1999, Dr. Demas suspended Petitioner for three days. The suspension was based on the conclusion that Petitioner violated the College's policy against gratuitous use of vulgar language in class by regularly using words and phrases in class such as "shit," "damn," "fuck," "ass," "butt-fucking" "blow job" and "tits on a

nun are as useless as balls on a priest" even though such language was not germane to course content.[4]

Petitioner's Campaign To Protest His Personal Employment Situation And Retaliate Against The Student Complainant.

Consistent with the student complainant's fears, and in violation of federal and state anti-retaliation and student privacy law, the governing collective bargaining agreement, the College's anti-harassment policy and an oral directive, Petitioner distributed the student's complaint to the faculty, along with a lengthy attachment entitled: *"An Apology: Yes, Virginia, There is a Sanity Clause"* (*"Apology"*) [Appendix B.] Petitioner admitted in

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[4] Petitioner claims in his Petition that his vulgar language and graphic sexual discussions in class were "never gratuitous, were always germane to course content" and had a specific educational purpose. Again, this is not the position Petitioner took before the College suspended him for three days. Petitioner was afforded two opportunities in December of 1998 to explain how the language in question was germane to course content. He failed to do so. Petitioner has never contested the accuracy of MacQueen's affidavit, included in the record below at R. 17, Exhibit 10, which states that Petitioner did not explain how his language was germane to course content before his three-day suspension. The contradictory explanations Petitioner has given for his use of the language (*i.e.*, statements made in briefs, his affidavit and in his *"Apology"*) were all drafted or distributed after Dr. Demas imposed the three-day suspension. For example, Petitioner's allegation that the words and phrases were employed as a means to instruct students how certain authors were forbidden from using certain language is a new argument before the Court which is unsupported by any record evidence.

his *Apology* that he wrote his *Apology* to protest the College's investigation of the student complaint. He also admitted that he directed his *Apology* to "any possible student who complains in the fashion . . . " the student complainant did. [Joint Appendix, at 698, 8/3/99 Hearing, at 47.]

"*An Apology*," which purports to be the apology the student complainant had requested in her sexual harassment complaint, is an articulation of and defense against the charges the student and the administration lodged against him, as well as an attack that ridicules, demeans and belittles both the student complainant and the College administration. Petitioners *apology* insults the student by using phrases in reference to her such as: "When, at length, you grow up . . . " and "The only persons in my classes who are stirred, in any antisocial sense, by my diction are either the very unfortunately 'wired,' on the one hand, or the very young, Virginia, on the other." It suggests that filing a sexual harassment complaint against him is cowardly and underhanded, stating "Shame on you, Virginia – so very young and yet so devious" and characterizes a student's assertion of her civil rights as "terrorist's tactics. . . . " The document also lashes out at the College, referring to William MacQueen, Vice President for Human Resources, as "the grand inquisitor," calling an administrative policy "bullshit," implying that the College administrators are Nazis and charging that "the majority of administrators . . . give neither fig nor rat's derriere for real students' interests. . . . " [Appendix B.]

In addition to demeaning the complaining student, Petitioner admitted in his *Apology* that he had failed to

explain why he had used the vulgar language in class during the investigatory meeting and hearing in December. [Appendix B, p. 3.]

The College Instructed Petitioner To Stop His Illegal Conduct.

After learning of Petitioner's insubordinate, retaliatory conduct and dissemination of confidential documentation, MacQueen gave Petitioner a written directive, stating:

> Because your posting, distribution and discussion of student complaints of sex harassment . . . conveys the message that complaining students may expect to be ridiculed by you and ostracized by their classmates, and thus may be deterred from complaining, you are hereby directed not to post, distribute, or discuss verbally or in writing (inside or outside the classroom) specific complaints filed by one or more of your students against you regarding sex harassment . . . with any person enrolled in one or more of your classes unless written permission has been granted by [Provost] Dr. Rose Bellanca upon application of your union attorney. This prohibition extends to discussion of any disciplinary action which has or may be taken against you.

Petitioner then violated this written directive by disseminating the confidential student complaint to a local newspaper, television stations and "one of the more

outspoken" students.[5] Petitioner also defied the directive by insubordinately informing his students, in class, that he had been suspended.

The Suspension With Pay.

Based on this and other suspected misconduct, the College notified Petitioner that he was suspended, with pay, pending an investigation into whether Petitioner abused his grading authority, disobeyed administrative directives and insubordinately disseminated a confidential student record in violation of federal law. Petitioner thereafter brought this lawsuit under 42 U.S.C. §§ 1983 and 1985, claiming, *inter alia*, that the steps set forth above violated his First Amendment right to "academic freedom."

Provost Bellanca Decided To Suspend Petitioner Without Pay.

At an investigatory meeting in May, 1999, Petitioner admitted to most of the issues of misconduct, such as his public distribution of the student's sexual harassment complaint and the *Apology* response. Provost Bellanca

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[5] There is no record evidence to support Petitioner's claim, made for the first time in his Petition, that Petitioner's motivation for publishing the student complaint was to encourage "any student with similar views [to] inform the professor, the class or the College." Respondents submit that this new contention is belied by the text of Petitioner's *Apology*, which sarcastically attacks and demeans the student for complaining.

thereafter announced her decision to (1) reprimand Petitioner for disrupting the educational process; (2) suspend Petitioner for fourteen days for insubordination; and (3) suspend Petitioner for four months for breaching confidentiality and retaliating against the student who filed a sexual harassment complaint against him. [Appendix C.] Petitioner's use of non-germane vulgarity in class played no role in this four-month suspension.

The Proceedings Below.

Following several hearings, two days of testimony and closing arguments, the district court issued an opinion and order granting *Plaintiff's Renewed Motion for Injunctive Relief* with regard to the four-month suspension and ordering Petitioner's immediate "reinstatement," with pay. *Bonnell v. Lorenzo*, 81 F. Supp. 2d 777 (E.D. Mich. 1999). On March 1, 2001, the Sixth Circuit held that the district court had abused its discretion in enjoining the four-month disciplinary suspension and reversed the order granting injunctive relief. *Bonnell v. Lorenzo*, 241 F.3d 800, 824-825 (6th Cir. 2001).

REASONS FOR DENYING THE PETITION

I. This case does not present a significant issue involving the First Amendment protection of public employee speech on matters of public concern because the Court of Appeals concluded that Petitioner's public dissemination of a confidential student civil rights complaint and retaliatory response thereto (*"An Apology: Yes Virginia, There is a Sanity Clause"*) constituted protected speech "addressing a matter of public concern."

Petitioner paints an alarming picture about the ramifications of the Court of Appeals' holding, suggesting that it allows college administrators to "stop discussions of sensitive but legitimate topics" such as love, relationships, death and alleged harms to academic freedom. Contrary to Petitioner's dramatic characterizations, however, the Court of Appeals did not adopt a speech-restrictive approach. The Court of Appeals took a speech-permissive approach to this dispute, agreeing with Petitioner's assertion that his distribution of the student sexual harassment complaint and retaliatory response constituted protected speech "addressing a matter of public concern."

Petitioner's rhetoric about the "Orwellian tactics" of precluding public employees from addressing certain topics in public is also unavailing. The College did not discipline or threaten to discipline Petitioner for discussing academic freedom in public or for publicly complaining about the College's policy prohibiting non-germane vulgarity in class. The College simply took issue with Petitioner's decision to insubordinately release a student's confidential civil rights complaint and Petitioner's

decision to conduct himself in a manner that constituted illegal retaliation against a civil rights complainant. In holding that the College's interest in prohibiting such conduct outweighed Petitioner's interest in retaliating against a civil rights complainant and releasing a confidential student record, the Court of Appeals did not hold that public institutions can keep public employees from discussing important topics in public. The Court simply held that while Petitioner may discuss sensitive issues in public, the College has a predominant interest in making sure he does not violate federal and state law while doing so. Accordingly, Petitioner's predictions regarding the impact of the Court of Appeals' decision are baseless. Indeed, the Court of Appeals concluded its opinion by expressing its "deep commitment" to a speech-tolerant construction of the First Amendment. *Bonnell, supra,* 241 F.3d at 826.

Moreover, the language-in-class issue framed by Petitioner does not resemble the record in the litigation below. There are no facts in the record to raise the issue whether a college can or should require teachers to alter course content to satisfy hypersensitive students. Nor is this a situation where a college has disciplined a teacher simply because a student found something offensive and claimed it constituted sexual harassment. The language-in-class dispute, which was not the basis for the four-month suspension the district court and the Sixth Circuit addressed below, simply concerns whether a publicly-employed teacher violated a clear, well-promulgated policy prohibiting teachers from using words like "fuck," "cunt," "pussy," "blow-job," "tits" and "shit" in class

unless those words are related to course content. Petitioner was repeatedly reminded of this policy and personally warned that continued use of such language in class, unless germane to course content, would result in discipline. It was Petitioner's continued use of such language that required the three-day suspension.

Not only is there an absence of any language in the Court of Appeals' opinion that could be read in the speech-restrictive manner Petitioner suggests, but the Sixth Circuit demonstrated the contrary earlier this month in *Hardy v. Jefferson Community College and Kentucky Community and Technical College System*, ___ F.3d ___ 2001 WL 912804 (6th Cir. 2001). In *Hardy*, the Sixth Circuit held that a teacher cannot be disciplined for germane classroom vulgarity that a student finds offensive. The court thus recognized the distinction between germane classroom speech that has a tendency to offend, which it held is protected, and the non-germane vulgarity Petitioner used. *Id.* Accordingly, Petitioner's inflammatory claims that the Court of Appeals' opinion in this case would result in student-dictated course content, censorship of scholarly opinion and prior restraints are wholly unfounded.

II. The Court of Appeals, having given petitioner the benefit of treating parts of his retaliatory conduct as "protected speech," correctly applied the standards required by *Pickering* and *Connick* in balancing Petitioner's interest in speaking the way he did against the College's interest not only in the overall "efficiency" of its publicly-funded educational mission, but also the College's compliance with important statutory and contractual requirements, including (A) protection of sexual harassment complainants from retaliatory conduct, and (B) confidentiality of student records.

This Court has repeatedly held that a state has rights to regulate the speech of its employees that "differ significantly from the rights it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Where, as the Court of Appeals held in this case, Petitioner spoke on a matter of public concern, his public employer may regulate the speech if the Petitioner's interests, "as a citizen, in commenting upon matters of public interest," do not outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra*, 391 U.S. at 568.

The Court of Appeals correctly applied this Court's precedents in holding that respondents' interest in disciplining Petitioner outweighed petitioner's negligible interest in speaking as he did. Petitioner conceded that he could have discussed the First Amendment, academic freedom or the College's germaneness policy without releasing the confidential student complaint or attacking and retaliatiating against the student who filed a sexual harassment complaint against him. (Joint Appendix at

722, 8/3/99 Hearing, at 71). The College, on the other hand, had compelling interests in disciplining Petitioner for these actions.

For example, the College reasonably believes that Petitioner's conduct constituted illegal retaliation against the complainant for asserting her civil rights, in violation of the *Michigan Civil Rights Act*, M.C.L. § 37.2701; M.S.A. § 3.548(710); *Title IX of the Civil Rights Act of 1964*, 42 U.S.C. § 2000e-3(a), *see* 20 U.S.C. § 1681. EEOC Regulations, *see, Guidance on Investigating, Analyzing Retaliation Claims*, and the College's sexual harassment policy. The College had a powerful interest in complying with its obligation under federal and state civil rights law to prevent such illegal retaliation. *See Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996) (upholding discipline where a professor retaliated against two students who had complained that they were sexually harassed by the professor's sexual commentary in class by discussing the students' complaints in class); *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986) (anti-retaliation laws are designed, in part, to preclude the chilling effect of frightening people away from asserting their civil rights due to adverse treatment incurred by other complainants).

In addition, Respondents reasonably believed that Petitioner's unauthorized distribution of the student's sexual harassment complaint, a student record that may not be released without authorization under the *Family Educational Rights and Privacy Act* ("*FERPA*"), 20 U.S.C. 1232g, violated *FERPA*, the confidentiality provision in the College's Sexual Harassment Policy, and Article VIII.A.7. of the Collective Bargaining Agreement between the College and Petitioner's union. [Joint Appendix, at 259.] The College had a compelling interest in complying

with these statutes, policies and contractual obligations. *See Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) ("the need for confidentiality" is one of the interests of a college that will override a professor's "right" to speak even on issues which might be of public concern).

Moreover, the College had a strong interest in preventing the disruption of the academic process caused by Petitioner's insubordinate decision to inform his students that he had been suspended, thereby inspiring most of his students to skip class and stage a disruptive scene even though the College had provided a substitute teacher during his three-day suspension. [*See Appendix C, C-2-C-4.*] *See Pickering*, 391 U.S. at 572-573 (the state can restrict educators' speech if the speech "impede[s their] proper performance of . . . daily duties in the classroom or . . . interefere[s] with the regular operation of the schools generally"); *Anderson v. Evans*, 660 F.2d 153 (6th Cir. 1981) (school's interest in maintaining efficient, regularly functioning school system outweighed interest of tenured teacher in making remarks reflecting her attitude about African-Americans).

The College's failure to protect and enforce these interests could have subjected it to damaging and costly consequences, such as expensive and unnecessary lawsuits and a potential loss of federal funds. The Court of Appeals correctly held that the College's interests, several of which involve its duty to comply with statutory and contractual obligations, outweigh Petitioner's decision to release confidential documents and retaliate against a civil rights complainant.

Petitioner argues that the College's interests should be dismissed because they are "speculative" and because the College's "damages" are, at least at this point, allegedly "non-existent." In other words, Petitioner would preclude pro-active measures and require the College and, presumably, all public employers to let their employees continue their unlawful conduct until the reasonably feared consequences of such conduct actually materialize. Petitioner fails to cite this Court to any authority to support this proposition and, indeed, no such authority exists. To the contrary, this Court made it clear in *Waters v. Churchill*, 511 U.S. 661 (1994), that a public employer is not required to wait until its reasonable fears come true; it may act prospectively to discipline employees if the employer reasonably believes the speech or conduct may damage its public mission. *Id.* at 673 ("we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large"); *Connick v. Myers*, 461 U.S. 138, 151 (1983), *quoting Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (" 'the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch' ").

III. There is no decision from another circuit that deviates in any significant respect from the Court of Appeals' application of *Pickering* and *Connick*.

A. There is no conflict on the issue of whether the College's interests in disciplining Petitioner for retaliatory conduct and breach of confidentiality outweighed the Petitioner's speech interests.

Petitioner has not even attempted to identify a split in the circuits on the issue of whether the College's interests in disciplining Petitioner for retaliating against a civil rights complainant and breaching confidentiality outweigh his interests in speaking as he did. Nor does such a conflict exist. Respondents are aware of no Court of Appeals' decisions that conflict with the fact-intensive balancing the Sixth Circuit performed in this case. Accordingly, and where the Court of Appeals in this case applied a well-established framework for resolving issues arising from employer-imposed limitations on a public employee's speech, there is no reason to review the Sixth Circuit's holding that balancing favored the College.

B. There is no conflict on the issue of a public educational institution's right to discipline a teacher for using vulgarity in the classroom that is not germane to course content.

In an effort to create a conflict on the language-in-class issue, Plaintiff makes the simplistic claim that "First Amendment rights are not uniformly interpreted or enforced in this country on campuses of higher learning or in appellate courts." Petitioner then cites to a loosely

connected spectrum of cases that reach different results on various First Amendment-related issues. The supposed conflict is illusory. Petitioner cites but two cases, *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) and *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995), that directly address a teacher's alleged right to use vulgar language while teaching. Both of those cases, which were cited in and are consistent with the Sixth Circuit's opinion in the case at bar, upheld a college's right to discipline a teacher for non-germane profanity. Plaintiff does not cite to a single case that conflicts in any material way with the holdings or rationale of these Court of Appeals' opinions.

The other cases to which Petitioner cites – cases Petitioner uses to support the alleged conflict – deal with distinguishable issues bearing no resemblance to the narrow issue the Sixth Circuit addressed. Two of the cases Petitioner cites, *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000) and *Bonds v. Milwaukee County*, 207 F.3d 969 (7th Cir.), *cert. denied*, 531 U.S. 944 (2000), do not even involve academic institutions, let alone the issue of whether an academic institution may constitutionally control class content or proscribe non-germane vulgarity in class. The school-related cases Petitioner cites, *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) and *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997), are also inapposite. *Saxe* involved a vagueness/overbreadth challenge to a campus-wide harassment policy that some students thought might hinder their right to freely exercise their religious convictions. *Burnham* involved a challenge to a school's content-based decision to remove certain photographs from a showcase located in a public corridor. Neither case addressed a college's interest in proscribing non-germane vulgarity in

class. Indeed, the *Saxe* court (where the challenge was not made by a public employee and the *Connick/Pickering* analysis was therefore not involved) suggested that its analysis may be different if the speech in question has been school-sponsored speech or if there was some legitimate pedagogical reason to restrict the speech in question.[6] *Saxe, supra,* 240 F.3d at 213, 214.

The issue Petitioner attempts to raise is whether the College can constitutionally suspend him for three days for saying "fuck," "butt-fucking," "pussy," "cunt," "tits," "blow job" and "shit" in class even when the words bear no relationship to the subjects his students were paying to learn. This issue is not ripe for this Court's review, however, because the language-in-class issue did not form the basis of the four-month suspension the lower courts addressed. Regardless, the College believes that disciplining Petitioner for using non-germane vulgarity

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[6] Although *Cohen v. San Bernardino Valley College,* 92 F.3d 968 (9th Cir. 1996), may appear on a superficial reading to concern a college's right to proscribe vulgar language in class, the Ninth Circuit expressly avoided that issue. *Conen, supra,* 92 F.3d at 972 ("We do not decide whether the College could punish speech of this nature . . . "). The Ninth Circuit in *Cohen* simply held that the wide-ranging, campus-wide anti-harassment policy that the college used as a basis for disciplining a professor was unconstitutionally vague and overbroad. Unlike the policy at issue here, however, the policy in *Cohen* was not limited to classroom language or non-germane class discussions. Also unlike this case, the policy in *Cohen* was used as a basis for discipline even though the professor had no reasonable warning that his conduct may violate the policy. Here, on the other hand, Petitioner was given a series of warnings which specifically forbade the language in question and clearly warned him that further use of such language, unless germane to course content, would lead to discipline.

in class keeps classroom discussions topical, facilitates a better and more universally efficacious learning environment, bolsters its academic reputation and facilitates student recruitment and retention without detracting from the quality of its students' education. Moreover, the College is legally obliged to provide a learning environment free from objectively offensive harassing conduct and comments. *Franklin v. Gwinett County Public Schools*, 503 U.S. 60 (1992) (colleges can be held liable for their professors' sexual harassment of students). The Courts of Appeals have resolved pedagogical disputes such as this in favor of academic institutions, not the individual teachers they employ, and have consistently held that academic institutions may constitutionally control class content and restrain its employees' use of non-germane vulgarity in class. *See, e.g., Hardy v. Jefferson Community College and Kentucky Community and Technical College System*, ___ F.3d ___ 2001 WL 912804 (6th Cir. 2001) (reaffirming that a College has a right to prohibit non-germane vulgarity in class); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, ___ U.S. ___ (2001) (individual educators enjoy no First Amendment right to academic freedom); *Dambrot*, 55 F.3d at 1189 (college basketball coach had no right to use the word "nigger" when teaching/coaching); *Martin*, 805 F.2d 583 (college professor has no First Amendment right to use vulgar language while teaching class); *Boring v. Buncombe Co. Bd. of Ed.*, 136 F.3d 364 (4th Cir.), *cert. denied*, 119 S. Ct. 47 (1998) (teacher had no constitutional right to ignore administrative direction and present a play containing potentially objectionable sexual themes); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992) (college professor

had no First Amendment or academic freedom right to disregard his employer's academic direction and discuss in class his theory that religion plays a role in human physiology); *Bradley v. Pittsburgh Bd. of Ed.*, 910 F.2d 1172, 1176 (3rd Cir. 1990) (teachers' rights do not extend to "choosing their own curriculum or classroom management techniques in contravention of school policy or dictates"); *Kirkland v. Northside Independent School Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) ("public school teachers are not free, under the first amendment, to arrogate control of curricula . . . "); *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) ("first amendment does not require that each nontenured professor be made a sovereign unto himself" with respect to course content); *Adams v. Campbell County School Dist.*, 511 F.2d 1242 (10th Cir. 1975) (dismissal of a teacher for failing to keep discipline in class, being too informal, discussing current events, and playing records in class was permissible); *Clark, supra*, 474 F.2d at 931 (a college professor's "disputes with his superiors and colleagues about course content and counseling were not 'matters of public concern' and involved [the professor] as a teacher rather than an interested citizen"); *Ahern v. Bd. of Ed. of Sch. Dist. of Grand Island*, 456 F.2d 399, 403, 404 (8th Cir. 1972) ("Simply stated, our conclusion is that Miss Ahern was invested by the Constitution with no right either (1) to persist in a course of teaching behavior which contravened the valid dictates of her employers, the public school board, regarding classroom method, or (2), as phrased by the district court, 'to teach politics in a course in economics' "); *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) ("free speech does not grant teachers a

right to say or write in class whatever they may feel like . . . "); *Valeria G v. Wilson*, 12 F. Supp. 2d 1007, 1027 (N.D. Calif. 1998) ("This amicus also argues that teachers have an absolute First Amendment right to teach whatever they want in the classroom. This court does not believe that the scope of the First Amendment goes that far. Courses and methods of instruction can be and are governed by state and local school district regulations, without violation of the First Amendment rights of teachers."); *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1433 (C.D. Ill. 1996) ("[t]he academic institution enjoys a position of supremacy in addressing curriculum content"); *Scallet v. Rosenblum*, 911 F. Supp. 999, 1006, 1017 (W.D. Va. 1996), *aff'd*, 106 F.3d 391 (4th Cir.), *cert. denied*, 521 U.S. 1105 (1997) (college professor's classroom discussions that were outside the scope of the course were "not protected by the First Amendment" because the administration's duties to establish curriculum "outweighs [the college professor's] interest in teaching his own material. . . . "); *Mercer v. Mich. St. Bd. of Ed.*, 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974) ("There is nothing in the First Amendment that gives a person employed to teach the constitutional right to teach beyond the scope of the established curriculum. Nor are there any judicial decisions giving the teacher the right to teach beyond an established curriculum").

If colleges and universities did not have a preeminent right to control classroom content, colleges and universities would be at the mercy of their teachers, and there would be no constitutional way to prevent a professor from wasting class time, illegally harassing students,

adopting ineffective teaching styles or relaying information in a way the school considered to be an absurd, unhelpful or even detrimental way to teach a particular discipline. As the Court of Appeals in this case held below after reviewing all the facts and the entire record:

> To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that *whatever* they say or do will be protected. Such a result is one that a state college or university is legally obligated to prevent, and such a result would fail to consider the countervailing interests. [*Bonnell*, 241 F.3d at 824.]

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX A

November 6, 1998

To whom it may concern:

This is a letter of formal complaint against Professor John Bonnell. I am currently a student in Mr. Bonnell's class, English 122 from 8-9:30 PM on Mondays and Wednesdays. My complaint against Mr. Bonnell is sexual harassment. Due to the fact that this is a very serious charge, I will substantiate this charge in an oral interview.

Beginning in middle to late September the atmosphere of the class started to change from comfortable to extremely offensive. Mr. Bonnell began using lude and obscene comments. These comments stemmed from English stories that we were reading in class, and he decided to add his own personal comments. These comments were dehumanizing, degrading, and sexually explicit. Some of the stories that were required reading revealed sexual innuendoes and implications. This should have been dealt with in a professional and appropriate manner, yet Mr. Bonnell displayed a lack of maturity, sensitivity, and responsibility, by taking advantage of the conversations to express his own previous sexual experiences. If this class had been a psychology or human sexuality class, I might have understood more of why sex was the major content of our class. This was supposed to be an English class and I feel cheated out of my money because I paid tuition to learn English. I did not pay to hear about Mr. Bonnell's sexual escapades. I feel that he also used his teacher position as a platform for authority to intimidate his students not to complain about him. Mr. Bonnell repeatedly made fun of students who had

expressed offense or disgust and he also laughed at them. This is one of the reasons why I did not come forward sooner. I feel compelled to speak up now so as to save further embarrassment to Macomb Community College. I, as a student, and as a wife have been strongly affected mentally and emotionally due to the sexual harassment from Mr. Bonnell. My husband and I are fully prepared to take this sexual harassment complaint to the highest level of authority it can go.

My goals of filing this complaint is to, at the very least, receive credit for English 122, and a written apology from Mr. Bonnell. I also would like Mr. Bonnell to be dismissed from the college immediately. Mr. Bonnell also needs to go to a counselor to discuss his sexual problems. I would also like Mr. Bonnell to be denied all access to my and my husbands social security numbers, student accounts, address, and telephone numbers. I expect and demand that this sexual harassment be taken seriously and given top priority. Thank you for acting immediately and swiftly in this matter.

Sincerely,

Susannah D. Derouin

APPENDIX B

An Apology: Yes, Virginia, There is a Sanity Clause

Young lady, before identifying the clause in the title, and as a preface to the apology you desire, let me review the two articles of impeachment which you have preferred against me. First, there is the one count of butt-fucking; second, there are the three counts of blow-job. The first charge all by itself, I must confess, would inspire squeals of protest even from the most asinine, the most cheeky. The second charge, on the face of it, is more than your average mouthful. I marvel at your courage in bringing notice of these alleged outrages to the proper authority, and I am amazed by the modest remedy you require.

In short order, I was summoned before the college's highest tribunal where the grand inquisitor himself, with the support of sundry assistants, subjected me to rigorous cross-examination. I was not informed beforehand as to the specifics of this interrogation, apparently because the examiners were after the truth of the matter and probably felt that the element of surprise would tend more profitably to that end. Professors are rather like politicians: give them ample time to consider any question, they are apt to expatiate ad nauseam. I did know, because of your "formal complaint," what the fundamental charge might be: sexual harassment. But, as that might be anything from gang rape by a branch of Hell's Angels to an indiscreet plucking at one's own wedgie, I couldn't imagine what witches' spew might be brewing.

Consider, Virginia, the second article of impeachment first. Had you voiced your exception to blow-job in class, two things would have occurred. First, you would have been given credit for class participation, according to our academic contract; second, I would have reminded you of the orientation I announced on day one. To wit, however idiosyncratic it may seem, I take all of the English language as my medium or as an opportunity for scrutiny – I do not make "political" or "moral" or "social" distinctions between one word, one phrase, and another. (I will make note that others do, when such notation is instructive.) The only distinctions worthy of critical attention pertain to sense, or meaning, and thus to communication. (On rare occasions, where three or more students have expressed common discomfort, I have acceded to such a significant minority. The intent, after all, is to teach – not to posture or to proselytize.) I leave the subjective categories of "obscene" or "profane" or "vulgar" to Goody Twoshoes and to the bizarrely schizoid courts. The latter understand that flag-burning is legitimate symbolic expression, and that neo-Nazis and racial supremacists must be allowed to voice their hatred. Violence is as homespun as Oklahoma City and Waco; we know how, and have a will, to protect our own. Try making allusions to sexual or other body functions? Let's hear how you sound, buddy, with your tongue torn out.

Furthermore, I probably would have pointed out that "blow-job" is a euphemism, and an absurd one at that. There have been blow-jobs galore executed on campus nearly every day of this unseasonably mild autumn. Young men, with gasoline-fueled engines strapped to their backs, have repeatedly disrupted my daytime

classes via the cacophonous blow-jobs they administer to the reverberating quadrangle. (Those who maladministrate this college apparently deem a tidy milieu more critical than intramural discussion or lecture. Perhaps we should indict those responsible: for "environmental harassment," for perpetrating an aerial and auditory pollution far more egregious than any of my dynamic ejaculations. But there is little justice, Virginia, on this campus or in this world – only officious straining at gnats whilst camels hump through.)

Speaking of wordly injustice, I understand that my blow-jobs were peculiarly reprehensible, mayhap even criminal, because they were allusions to the spectacular entanglements of a William Jefferson Clinton and one Monica Lewinsky. What, the grand inquisitor wanted to know, could I possibly adduce to justify the discussion of political science in an English class? (I have subsequently been informed by students that at least two of our math professors also entertained this topic during class time. Mirabile dictu. Yet, I must concede, proliferation of crime does not absolve any isolated criminal.) It says, after all, in the cover letter to the college's "Revised sexual harassment policy" (July 30, 1997) that "Regular use of profane, vulgar, or obscene speech in the classroom which is not germane to course content (and thus educational purpose) as measured by professional standards will lead to the imposition of discipline."

But you see, Virginia, this sort of legalese is variantly known in the grown-up, adventitiously sane, world as bullshit. Profanity, vulgarity (I'm especially fond of this one, since it ensnares virtually everyone in its aristo-analcratic web; look it up, and you'll see what I mean. You

will think: "sump'n ain't right here," and you'll be right, and wrong, altogether.), and obscenity (this one's a doozy, too. "Inciting lustful feelings; lewd," is the second definition. The other applications are reminiscent of "vulgar." The only persons in my classes who are stirred, in any antisocial sense, by my diction are either the very unfortunately "wired," on the one hand, or the very young, Virginia, on the other.) – all these are in the eye of the beholder. That's why even so august a body as the U. S. Supreme Court has continually tied itself into comical knots trying to sort out the sordid, parse the putrid, and teet the totter. That which is "germane to course content" is best left to the professional (more on "academic freedom" later), while "imposition of discipline" is reserved for the amusement of inquisitors.

Nevertheless, I was somewhat taken aback by this "germanity," and possibly failed to make the fullest explanation. That is, while the preponderance of my classroom time focuses on the "analysis of the function of particular words, phrases, or images" that appear in our texts, I don't want my students mistakenly presuming that such analytical skill is germane only to literature. You may recall that we also examined statements offered in the "media" or in other printed sources. For example, apropos the President and the Intern, I probably commented on a CNN reporter's language early in September when she said: "The president was involved in another prickly face-off vis-á-vis the press this morning." I may well have pointed out that the cunning linguist who wrote this script failed to tripp up the straight-faced journalist who had to deliver so slyly veiled an allusion to fellatio. James Joyce, who flourished in an era almost

as neurotic as our own, and who was a consummate word-smith enamored of pun and innuendo, would have loved this broadcast moment.

By the bye, Virginia, you may be pleased to learn that fellatio is the preferred articulation of the grand inquisitor. He used this variant at least twice during cross-examination of my person. Fellatio, being Latin, is deader than Cleopatra's asp. When dragged into English dialogue, it constitutes a euphemism which does for communication what blurring does for lenses, what "snow" does for TV, what static does for radio. As such, it reminds one of William Faulkner's character Snopes, who'd step on the gas pedal and the brake pedal at the same time, generating considerable noise but scant motion. I can recall my own mother posing ambiguities when she yelled at me: "Don't touch that! That's ca-ca!!" I couldn't tell if she was referring to the dog turd on my right or the attractive, E-coli-free-but-used condom on my left. (Giving the latter a blow job, I was thrilled at how rapidly and easily it filled. . . . Years later, when she lay dying of colon cancer, I would irrigate her stoma betimes with my bare finger; it definitely was shit, but it wasn't ca-ca.) Wherever the grand inquisitor's pettifogging fellatio may have drifted or tended, he might have been talking about sucking cock anyway. Hard to say.

I am sorry, Virginia, that you find your own language, the English language, so painful.

What about the other charge, that I committed one buttfucking? I was invited to reconstruct the context for that one, that snappy trap, since it apparently didn't dovetail with the political "digression." I'm depressed to

admit I stumbled here, too; I was more fascinated by the collective inquisitors' scribbling in reaction to my affirmative, my admission; and, though I labored, I only vaguely remembered the circumstance. Now, however, I seem to recall that we – the class – were discussing the Greek word philia, and its multiple manifestations in modern English. I believe we covered "philosophy," love of wisdom; and "Philadelphia," love of the adelphoi, the brothers; and "pedophile," love ("love?!" – how absolutely absurd, we agreed) of children; and, finally, after several others, we wandered toward "necrophilia," love of death or, erotically, of the dead. Then, because I assume I am among adults who are students of life as well as of language, we talked about a notorious instance in Detroit some fifteen years ago wherein an Indian Village gardener murdered his girlfriend, buried her body on the estate grounds, then dug it up two weeks later and fucked the corpse – because he was certain "she" must have gotten lonely. To lighten things, after the gasps (no one regurgitated his or her supper on the floor, so I presumed some of the gaspers were emulating one of my traits: reveling in the histrionic), I used a Sam Kinison skit for comic relief. You know, the one where he imagines he's a corpse lying face down in a mortuary cooler, chilling out, congratulating himself for having fought the good fight, noting the looming presence of, what, the mortician? Why is he pulling Sam's fantoid's pants down?! What's he – Oh no!! NO!!

I miss Sam, the ex rev(erend). Life can be such a pain in the ass. It takes comic genius to conjure: is death also? I am sorry if you didn't appreciate my Samitation (don't look that up; it's a neologism, same as "fantoid" before it.

We're not supposed to indulge creative urges such as this unless we're famous. But, hell, I'm pushing sixty, and legitimate license is eluding my gasp.) You know, Virginia, my very caring, very percipient wife, speculates that this is what flipped you out, that perhaps someone important to you had died not long before. Is that true?

Literature and language, then, are my main concern, but analysis of same is not all I teach. Analysis is very important – but so is synthesis, the harmonizing of everything one is learning in formal situations such as the classroom with everything else that one has discovered – with everything that one is Becoming. As I often say (do you remember?), the characters that you meet in novels and stories and dramas and poems are not specimens on a Petri dish, remote, dissociated, unutterably alien. They are your kin; they are your reflection; they are you. The best artists are awesome gifts to us; Shakespeare, some say, is the finest psychologist who ever lived. Just so. And if you're not seeing your face in these mirrors, at least one of two things is true: you are not reading the literature very well, or, and this is far worse, you are not reading your own life very well. And there goes the Socratic challenge, his quintessential invitation: "to lead the unexamined life is not fit for a human being."

That Socratic test prods us to make every effort to raise to the fullness of consciousness all the forces and influences that have formed us, whether in the narrow confines of family or the broader world of friends and fellow citizens. Everything (including linguistic prejudices) we have learned, have found imprinted on our souls, is subject to review, regardless of source. Not the parent or the peer, not the preacher or the pedagogue,

who has altered us is above scrutiny. Test all things, and only then hold fast to what seems true.

We all start out as figments of others' imaginations, stuck with a cluster – usually contradictory – of derivative beliefs, values, opinions, biases, and "knee jerk" behavior. The more ancient a personal modifier, the more suspect it is: "I have believed thus-and-so all my life!" exposes not some noble constancy but, rather, the squawk of the parrot. Having, being, merely such a borrowed persona, the Self is always vulnerable: every alien idea, every weird or wild word, shakes such selves to the prefabricated core.

When we discuss, then, these masters' literary opera (that's a more charming plural – don't you agree? – than "opuses," which sounds like a disease, a suppurating sore; even dead Latin can sometimes afford us, the living, a chance to sing, a chance to play), you have observed that I often include personal anecdotes, illustrations from my own life of Walter Mittyesque incompetence, of "Open window"-like coups laid upon stuffy adults, of Little Chandler- or Bob Doran-like sexual fear and sexual fumbling. (For some reason you only cited my "sexual escapades;" weren't my nonsexual escapades interesting or memorable? I must try harder.) When I recount such anecdotes, I, as is true of most fine teachers, am offering a species of "modeling," practicing what I preach. See, student, this fictional jerk, buffoon, hypocrite, craven, etc., etc. – that was, hopefully no longer is, your teacher. I essay to make it safe for you to see your face, too. And many do. I can summon in fond memory those who've said: "This is more like a class in psychology!" or "a class in philosophy!" or "a class in history!" or "a class in

comparative religion!" or "a class in . . . science" is what I wish someone someday will say. No one has, and the silence is eloquent. Because I don't deserve better. But, you know – well, only a very few could guess – this is my darkest, deepest passion, to be a scientist. I expound on Shakespeare and Joyce, but I dream about Galileo and Einstein. Go figure (I never could, math being my vanquishing dragon). Consider the most intriguing "defnition" of humanity that I have ever heard: we are the process of the sun becoming conscious of itself. There, fellow Milky Wayf'er, is stuff enough to dream on for a googolplex of lifetimes.

I am so very sorry, Virginia, that you find my language, the English language, so painful.

I am also sorry that you grossly misrepresented an important aspect of our classroom experience: you allege that I "used [my] teacher position as a platform for authority to intimidate [my] students not to complain about [me]. Mr. Bonnell repeatedly made fun of students who had expressed offense or disgust and he also laughed at them. This is one of the reasons why I did not come forward sooner." This reminds me of what David Schippers said to the other witch-hunters in congress today (Dec. 10, 1998) about Clinton, that his lies were worse than mere lies "because they were half-truths." You make it <u>seem</u> that there were actual students that you witnessed actually being mocked or ridiculed by me. Paradoxically, this one of your allegations is the most obnoxious (to me, not to the majority of administrators, who babble rhetoric about "student needs" and yet give neither fig nor rat's derriere for real students' interests –

except for the few who come sidling over with fashionable complaints), because it is the one so alien to my nature, to my habits of respect and nurturance for the people I know I am privileged to meet.

It is true – this is your half of a truth – that I talked about previous hassles with the college administration over some students "lining up" (an obvious exaggeration for comic effect) at some dean's office to complain about the "bad man" with the "potty mouth." And, yes, a semester or more after the fact, I probably dismissed such folks (especially the cowards, the ones who never broach their disaffection in class or at any time to my face) with a gibe, a jeer, a hiss of derision. I tend to get a tad defensive when people don't just disagree with me, my values, my behavior, but who would also campaign for and delight in my utter destruction. Disagreement is fine; I welcome it and always remember to reward it. The clash of ideas and values is usually both exciting and illuminating. But I have never "dressed down," attacked, insulted, or ridiculed any actual student in any actual class. And you know that; you know there can be no corroboration for your arrant lie. (Shame on you, Virginia – so very young and yet so devious.)

Much is made, at least by the grand inquisitor and his ilk, about the power a teacher has, the power to grade, the power to humiliate. I cannot speak for my colleagues, but I know this to be a grave distortion where I am concerned. Those few students who poise a knife at my back are, indeed, afraid of something, but it isn't I. What they fear is the wrath of their peers, their classmates – other human beings put at risk, betrayed, by the craven treachery of one or, rarely, two. All their cowering

behind the inquisitor's hooded robe cannot conceal this truth. But, irony of ironies, because of the contract I made with you at the commencement of the term, and because you'd earned sufficient credit before demanding my head on a platter, I am morally obliged to record on your account a passing grade. It is as much my integrity, and none of your terrorist's tactics, which prospers you.

Again, have actual students ever gotten uncomfortable in my classes? Certainly. I am not a "post-modernist," a flaky "relativist" who thinks any idea is just as wonderful as any other. I definitely do not respect lots of folks' beliefs, values, ideas, notions, prejudices, customs – but, curiously enough, I do respect the people. As Pope John XXIII put it back in 1958: "error has no rights, but those who subscribe to the errors do." A horde of Catholics weren't happy, back then, with such a mealy-mouthed sentiment; they hankered for the consignment of all "them comm'nist bastards and hair-ticks" to eteral flames, at least. They would have gleefully done to their enemies, Virginia, what you would do to me now. The only defense people such as I have against people such as you is in your hands: my words.

My language, my words. While broadly distinguishing between what I call "the discourse of reason" and "the discourse of passion," I take all language as my world, since the gradations between the antipodes are often so subtle. (This very apologia, you will perhaps notice, has a bit of reason amid the rush of passion. (C'est moi.) Sometimes, in a classroom, I become so enthused (en theos, the god within: beware, beware; his flashing eyes, his dancing hair!), so animated, so caught up in an exigent flow, the stream of words pours forth like molten

gold that hopefully heats and informs as it dazzles – or, at other times, tumbles and cools like a high waterfall. (I'm also very modest.) If I had to check this flow, constantly monitor its force or direction, I would be, I would have to become, a radically different, a wholly diffident, teacher. Sure, I can be, and often am, the calm pedagogue, precisely measuring out the cadences appropriate to pure reason. But if I had to be that always, a very important part of me would die. (The only way the inquisitors of the world can ever ensure "germaneness," good Germaneness, is when all the classes are on-line. There'll be no messy spontaneity then, in their dreary Dystopia.)

It's to avoid such death, to withhold "the chilling effect" of self-censorship, that our culture has evolved the practice of "academic freedom." This is not some bonus, some perk designed to comfort teachers. And its bestowal does not depend upon the pleasure of administrators or colleagues. It exists, rather, for the benefit of students, your colleagues, your peers. They require authentic, truthful guides, mentors, sources – to question, to push against, to grow with. And one day, hopefully, to rise far above. This can't happen with robots, with company men, with even the very best of good Germans.

So, then to conclude this my apologia. I am sorry, almost ineffably sorry, that you find our language, the English language, so painful. You will never have the power, of course, to restrict it, or to kill part of it, as you wish. Nor am I possessed of the tongue of men and of angels, so as to protect it from you or all the tribe of its detractors. It will continue to wend its way and may even find complete vindication, one day, from its shaky jurisprudential custodians. I will probably not see that day, as

it lies somewhere beyond the frenetic millennial epoch. But you may. Hopefully, by then, you will have learned to appreciate it. Maybe, then, you will understand that life without the fullness of your language's energy would be like that life Khalil Gibran says languishes without love: life where you may still laugh, but not all of your laughter; where you may still cry, but not all of your tears.

Oh! – the sanity clause! Virginia, I almost forgot! Here it is: "Congress shall make no law . . . abridging the freedom of speech. . . . " This has driven the thought police, the language censors, and all deputy inquisitors beyond despair, into madness. If I had access to your Christmas stocking, I would stuff it there. When, at length, you grow up, you will cherish it above every other gift, save love itself. Cheers.

APPENDIX C

[LOGO] Macomb
Community
College

Office of the Provost

MEMORANDUM

TO: Mr. John Bonnell

FROM: /s/ RBB Dr. Rose Bellanca, Provost

SUBJECT: Disciplinary Suspension

DATE: July 9, 1999

This memorandum is submitted as a statement of my findings regarding the charges of insubordination, breach of confidentiality, retaliation, and disruption of the educational process alleged in the notice of charges dated June 7, 1999.

Disruption of Educational Process

You contributed materially to the disruption of the educational process in class sections 271 KC (26 out of 28 students did not attend), 122 LA (25 out 27 students did not attend), and 122 LC (all 28 students were absent) on February 1 and 2, 1999, by three or more of the following means in each section: a) informing your students of the impending suspension on these dates; b) telling them, in effect, it was their choice whether they should attend class during your suspension; c) referring to Vice President William MacQueen's directive to you of January 8,

1999, as a "gag order"; d) reminding students of your policy of awarding credit for not attending class to students who sign an "attendance sheet" when you are absent; and e) distributing a copy of Susannah Derouin's complaint to Roger Weber of *Channel 4 News* and *The Macomb Daily*.

Each of these means was improper, and collectively they formed a personal encouragement to your students to disrupt the educational process in support of your cause and in protest of your 3-day suspension. Their impropriety is evident. You were directed on January 8, 1999, not to discuss your suspension with your students, yet you admittedly informed your students in all three of these sections that you were to be suspended on February 1-3. (See statements of Jeanette Estridge and Kelly Pierce, students in 271 KC; statement of Wayne Hukill, a student in 122 LA; statement of Sherry Davis, a student in 122 LC; and your statement on May 25, page 6.) Rather than encourage them to attend class in your absence – or at least remain silent on the question – you told the students in at least two of the three sections (271 KC and 122 LC) it was their choice whether they should attend class (see statements of Patrick Akerley (a student in 271 KC), Kelly Pierce, Denise Walsh (a student in 271 KC), and Sherry Davis; and your statement on May 25, 1999, page 25). In tandem, these statements are tantamount to saying to your students "I am to be suspended, and because I am to be suspended you don't have to attend class." They constitute a clear violation of the January 8 directive not to discuss your discipline with your students.

In at least two of the three sections (122 LA and 122 LC), you reminded the students of your policy of granting

credit because of your absence, thereby promising them a reward for their own non-attendance. (See statements of Wayne Hukill, Nicole Richard [a student in 122 LA], and Sherry Davis; your statement on May 25, 1999, pages 23-25; and the "attendance sheet . . . signed in full and total SUPPORT of Mr. Bonnell and in full and total PROTEST of Mr. Bonnell's suspension"). This reminder was not an innocent, coincidental restatement of pre-existing policy. To the contrary, your first-day handout for English 122 states "Attendance . . . will be taken but no credit can be earned for attendance, except on days when I am absent *and such absence was not announced in advance* (emphasis supplied). Students in attendance at such times should sign a sheet of paper, and the last one to sign should deposit the list in my mail-slot in F-211." By its terms, your policy does not apply to an absence announced *in advance*, as was the case here. Moreover, what was the point of *reminding* students of your policy other than to induce them not to attend class? Finally, awarding credit for a student's non-attendance when a substitute teacher is provided makes no sense. Your reminder had only one apparent purpose, and that was to encourage students to boycott classes in your absence.

Two other actions contributed to the disruption of the educational process in your classes: informing your students that you could not discuss your impending suspension because of the College's "gag order" (see statement of Denise Romanowski, a student in 271 KC; this statement is itself a violation of Mr. MacQueen's directive of January 8) and your distribution of Ms. Derouin's complaint to Channel 4 and *The Macomb Daily*, which violated Mr. MacQueen's directive as well as College policy, the

collective bargaining agreement with MCCFO, and Federal and State law.

Viewed together, your actions amount to an impermissible effort to enlist the sympathy and material support of your students in your cause against your employer and led to the disruption of the educational process in your classes and other classes on campus on February 1 and 2. I must remind you that the College is morally and legally obligated to provide an orderly and safe learning environment, one that promotes student learning and is free from the threat of violence. As you know, an altercation did erupt during the February 1, 1999 student demonstration on your behalf.

As a result of your disruption of the educational process, you are hereby formally reprimanded and warned that any future actions which contribute to the disruption of the educational processes at the College will subject you to further discipline.

Insubordination

During the week of January 17 and/or 24, 1999, you committed multiple acts of insubordination by discussing your impending discipline on February 1-3, 1999 with your students in clear violation of Mr. MacQueen's January 8, 1999 directive to you. On January 15, 1999, or thereabouts, and January 26, 1999, or thereabouts, you committed multiple acts of insubordination in violation of that same directive by distributing a copy of Susannah Derouin's complaint to Roger Weber of *Channel 4 News* and to *The Macomb Daily*.

Mr. MacQueen's directive of January 8 stated: "Because your posting, distribution and discussion of student complaints of sex harassment or your use of obscene or vulgar language conveys the message that complaining students may expect to be ridiculed by you and ostracized by their classmates, and thus may be deterred from complaining, you are hereby directed not to post, distribute, or discuss verbally or in writing (inside or outside the classroom) specific complaints filed by one or more of your students against you regarding sex harassment or your use of obscene or vulgar language, or such complaints against you generally, with any person enrolled in one or more of your classes unless written permission has been granted for good cause by Dr. Rose Bellanca upon application of your union or attorney. This prohibition extends to discussion of any disciplinary action which has been or may be taken against you."

Federal and State law impose a legal duty on the College to provide a learning environment free from sex harassment and a breach of this duty exposes the College to liability. College policy prohibits a teacher's use of obscene, profane or vulgar language in the classroom which is not germane to course content as measured by professional standards, and is specifically written to protect the rights of individuals who may choose to complain. Because individuals who feel aggrieved have the right to be heard, the College cannot and will not tolerate an employee's efforts to discourage complaints and ridicule complainants.

The directive of January 8, 1999 was issued to you in the wake of your previous efforts to stifle such complaints

and to publicly malign and intimidate individuals who file a complaint. Consider the following:

- You posted on the departmental bulletin board (to which students have access) the January 19, 1998 letter of a student's father complaining about your classroom use of such words as 'fuck', 'cunt', and 'pussy.'
- You posted Susannah Derouin's November 6, 1998 complaint of sex harassment on the same bulletin board.
- Two of the numerous student letters submitted on your behalf in November, 1998, quote directly from Ms. Derouin's complaint.
- You justified your use of obscene and vulgar language in Susannah Derouin's class by telling the class "This is how I teach," and derisively related how you have dismissed prior complaints from students. According to Ms. Derouin, you "laughed out loud and giggled like a little kid" in relating your handling of complaints from two former students (a woman and a male member of the clergy), attempting to make it clear to the class that complaining is futile.
- When Ms. Derouin asked for an apology you responded by writing your eight page document titled *An Apology: Yes, Virginia, There is a Sanity Clause* and distributing it to all of the College's full-time faculty, Roger Weber of *Channel 4 News*, *The Macomb Daily*, and at least one male student whose name is unknown to the College. Attached to your document was a copy of Ms. Derouin's complaint requesting an apology.

My point in reciting these events is simply to demonstrate that the college had a compelling reason for issuing the January 8 directive to you. By posting or distributing student complaints, as well as discussing them in class,

you have attempted to make it perfectly clear to your students what they may expect if they complain about you. Your repeated attempts to thwart the complaint process can not be ignored by the College.

As a result, the College finds you were insubordinate under the January 8 directive, and in light of the previous three-day disciplinary suspension which was issued to you, you are hereby suspended from your duties without pay for a period of fourteen calendar days, commencing August 18, 1999, and ending August 31, 1999. Your fringe benefits will remain in place during the period of this suspension.

Breach of Confidentiality and Retaliation

On December 21 and 22, 1998, or thereabouts, you violated a) Section I. A. and Section II of the College's Policy Prohibiting Sexual Harassment, b) Article VIII.A.7. of the Master Agreement between Macomb Community college and the Macomb Community College Faculty Organization, c) the Family Educational and Privacy Rights Act, d) Title IX of the Educational Amendments to the Civil Rights Act of 1964, and e) the Elliott-Larsen Civil Rights Act by distributing a copy of Susannah Derouin's complaint and your memorandum titled *An Applogy: Yes Virginia, There is a Sanity Clause* to all full-time faculty members and a male student whose name is unknown to the College.

On January 15, 1999, or thereabouts, and January 26, 1999, or thereabouts, you violated a) Section I.A. and Section II of the College's Policy Prohibiting Sexual Harassment, b) Article VIII.A.7. of the Master Agreement

between Macomb Community College and the Macomb Community College Faculty Organization, c) the Family Educational and Privacy Rights Act, d) Title IX of the Educational Amendments to the Civil Rights Act of 1964, and e) the Elliott-Larsen Civil Rights Act by distributing a copy of Susannah Derouin's complaint and your memorandum titled *An Apology: Yes, Virginia, There is a Sanity Clause* to Roger Weber of *Channel 4 News* and to *The Macomb Daily*.

Unlike the charges of disruption of the educational process or insubordination under the January 8 directive, which are offenses against a broad class of students or the institution itself, breach of confidentiality and retaliation strike specifically at an individual, and therefore are considered to be far more serious offenses. It must be recognized at the outset that Ms. Derouin regarded her complaint of November 6, 1998 as a complaint of sex harassment. Not only did she say as much in the complaint itself, but she verbally related some of your sexually-laden classroom commentary to the administration during the investigation of her complaint. For example:

- After a student mentioned "urban legends," you informed the class that you were trying to create urban legends yourself. You told the class that once you tried masturbating by smearing Vaseline on the inside of a toilet paper roll, inserting the roll over your penis, and then placing the toilet paper on or in a washing machine; however, your "cock" (to use your word) lost interest.

- You related to the class that as a young man you experienced guilt as the result of your masturbation, sought absolution from your priest, and threw away your *Playboy* magazines; however, after some time

passed your resolve evaporated, and you resorted to the story of Lot in the Bible for masturbatory stimulus.

- You related to the class your dream about a naked red-haired girl in your bed, saying it was one of the best dreams you have ever had.
- You related to the class your first sexual experience with a woman, saying you couldn't get your "soldier to stand at attention."
- You related to the class that you and your first wife would fondle each other and then go to church for absolution.

Of course, this commentary was in addition to the obscene and vulgar language for which you were disciplined in February ('shit', 'damn', 'fuck', 'ass', 'butt-fucking', 'blow job', 'tits on a nun are useful as balls on a priest'). Clearly, Ms. Derouin's complaint may be regarded as a colorable complaint of sex harassment even though you were not charged. Consequently, Ms. Derouin was entitled to the full protection of the law and College policy providing for confidentiality and prohibiting retaliation. Section III. D. of the College's Policy Prohibiting Sex Harassment (which was distributed to all faculty) clearly states that "Macomb Community College shall assure that no individual shall be retaliated against for making a complaint of sexual harassment, opposing sexual harassment, or participating in an investigation under this policy, *regardless of whether a policy violation is found* (emphasis added).

Further, the law, College policy, and Article VIII.A.7. of the collective bargaining agreement with MCCFO cannot be satisfied simply by redacting the complainant's name from the complaint. "Confidentail" means secret and the

requirement of confidentiality extends beyond the identity of the complainant to the complaint itself. This guarantee of confidentiality was utterly and repeatedly ignored by you.

By drawing the attention of the full-time faculty, other students, and the public at large to her complaint, you caused Ms. Derouin to suffer anguish, which may be regarded as a form of retaliation. The distribution of your memorandum titled *An Apology: Yes, Virginia, There is a Sanity Clause* was designed to discredit her as an immature young woman in need of enlightenment, and thus was designed to destroy her credibility as a complainant. Most significantly, your memorandum is thoroughly insulting and demeaning to Ms. Derouin as a person in both its content and its tone. It is the very antithesis of how a teacher should treat a student and how a complainant would expect to be treated given the assurances of the law and College policy.

As a teacher at Macomb Community College, you do not enjoy a privileged status placing you outside the norms of the college community or society in general. Without a high degree of mutual respect and trust between teachers and learners, Macomb Community College cannot succeed as an academic institution nor protect the academic environment. If an administrator or other staff member at Macomb treated a teacher as contemptuously as you treated Ms. Derouin, there would be a hue and cry from the faculty for termination of the offender's employment. If you truly desire to continue teaching at Macomb, you must bring yourself to recognize and respect the limits of your position and your responsibilities as a member of the teaching profession and our learning community.

The College finds your actions to be serious and willful violations of institutional policy, written directives from people in positions of proper authority, and most importantly, to be serious and willful violations of the legal and personal rights of a student who followed proper procedures in filing a complaint against you. It is also clear that you were fully aware of the severity of your actions since you were quoted repeatedly in the media, saying that you would probably be fired for what you had done. But, despite your own recognition of the severity of your actions and the formal written warning from the administration to discontinue them, you persisted with the offending behavior.

The College, therefore, finds you breached confidentiality and retaliated against the complaining student. In determining the appropriate discipline to be imposed for these offenses, the College has looked to the "guidance" published by the Office of Civil Rights within the U.S. Department of Education and to case law. The OCR Guidance states that the school should tell the complainant that Title IX prohibits retaliation and that, if she or he is afraid of reprisals from the alleged harasser, the school will take steps to try to prevent retaliation *and will take strong responsive actions if retaliation occurs.* The College tried to prevent further retaliation by its directive to you of January 8, 1999, which you ignored. The College now feels obliged to take strong responsive action. Case law supports actions as severe as termination as being appropriate discipline for breach of confidentiality.

The College gave serious consideration to terminating your employment effective immediately. However, in deference to your length of service with the institution, and

in the belief that rehabilitation is still possible, the College has decided upon a suspension instead. Therefore, you are hereby suspended from your duties without pay for the four months of the Fall 1999 semester, commencing August 18, 1999 and ending December 18, 1999. This suspension will run concurrent with the fourteen day suspension issued for insubordination. In anticipation of your return to work in the Spring semester, your fringe benefits will remain in effect during the period of the suspension.

c: Albert Lorenzo, William MacQueen, Gus Demas, Ruth Reed, Marie Baeckeroot, personnel file